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No. 02-

In the
SUPREME COURT OF THE UNITED STATES

DONALD ROPER,
Superintendent, Potosi Correctional Center,
Petitioner,

v.

STEVEN L. MANNING,
Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

ON PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

The statements at issue in this case were made by the respondent after an arrest warrant had been issued, but before the filing of an information and before any court appearance, such as a preliminary hearing or arraignment. The question posed is:

Does the mere issuance of an arrest warrant by a court constitute the initiation of adversary court proceedings to which the Sixth Amendment right to counsel attaches?

PARTIES TO THE PROCEEDING

Petitioner, Donald Roper, is the Superintendent of the Potosi Correctional Center, Missouri, where Respondent Steven Manning is confined. Superintendent Michael Bowersox, Roper's predecessor, was the respondent in the habeas action in the district court and the appellee in the court of appeals.

Respondent Manning is a prisoner in state custody. He was the petitioner in the habeas corpus action in the district court and the appellant in the court below.

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Petitioner, Superintendent Donald Roper seeks a writ of certiorari to review the judgment of the court below reversing the denial of Respondent Manning's application for writ of habeas corpus.

OPINIONS BELOW

The November 8, 2002 panel opinion of the United States Court of Appeals for the Eighth Circuit, from which petitioner seeks review, is reported at 310 F.3d 571 (8th Cir. 2002) and is published in the Appendix at App. A-2. The April 17, 2001 order of the United States District Court for the Western District of Missouri denying the petition for writ of habeas corpus is published at App. A-14, but it is not reported.

JURISDICTION

The opinion of the United States Court of Appeals for the Eighth Circuit was issued on November 8, 2002. The court below denied the petition for rehearing with suggestions for rehearing en banc on December 31, 2002 (App. A-75). Petitioner invokes this court's jurisdiction under 28 U.S.C. §1254(1). The court below had jurisdiction under 28 U.S.C. §2253(c), §2254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Sixth Amendment to the Constitution of the United States:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.

Fourteenth Amendment to the Constitution of the United States, Section 1:

> [Nor] shall any state deprive any person or life, liberty or property without due process of law . . . .

28 U.S.C. §2254(a):

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

Missouri Supreme Court Rule 22.01 (effective January 1, 1980):

> Felony proceedings may be initiated by complaint filed in any court having original jurisdiction to try misdemeanors, or by indictment.

Missouri Supreme Court Rule 22.03 (effective January 1, 1981):

> Upon the filing of a complaint and a finding by the court that sufficient facts have been stated therein to show probable cause that a felony has been committed by the defendant or upon the return of an indictment charging the commission of a felony, a warrant for the arrest of the defendant shall be issued unless the court orders the issuance of a summons. If the defendant is a corporation, a summons instead of a warrant shall be issued.

STATEMENT OF THE CASE

The question here relates to the admission at trial of statements made by Respondent Manning after a warrant was issued for his arrest, but before he appeared in court after arrest.

1. Kidnapping

On January 22, 1992, the cause against Manning went to trial before a jury. The evidence adduced at trial demonstrated the following:

Charles Ford was a drug dealer who owned The Irish Crook Tavern at Fifth and Walnut in Kansas City, Missouri. Anthony Mammolito's wife owned Jaime's Lounge across the street. Mammolito knew Ford. Ford's brother-in-law, Goldyn, was a frequent patron of Jaime's Lounge. Goldyn told Mammolito that he thought Ford was worth a lot of money and had access to $200,000 to $250,000 because of his drug dealings.

In early 1984, Mammolito went to Chicago to recruit individuals to help him kidnap Ford. Mammolito went to the house of a former fellow prison inmate, Thomas McKillip, and asked McKillip's help in kidnapping Ford. McKillip made a telephone call. About 15 to 20 minutes later, Manning showed up at McKillip's house. After discussing the kidnapping plans, Manning recruited Gary Engel to help with the kidnapping. The next night, Manning, Engel, McKillip and Mammolito met at Engel's house and discussed the kidnapping. Mammolito then returned to Kansas City.

A week or two later, McKillip drove to Kansas City and met with Mammolito. He told Mammolito that Manning and Engel would be flying from Chicago that night. McKillip showed Mammolito the paraphernalia that he had brought with

him, including police radios for cars, hand-held radios, an assortment of badges from law enforcement agencies, search warrants, a red light, handcuffs, pistols, and a utility line repairer's belt.

Later that night, Sharon Dugan, Engel's ex-wife, took Engel to the airport so that he could travel to Kansas City. Mammolito and McKillip picked up Manning and Engel at the Kansas City airport.

Mammolito, McKillip, Manning and Engel began following Ford. They followed him to the airport and watched him board a plane. They later learned that Ford's mother-in-law had died and that Ford was traveling to attend her funeral. Because nothing could be done until Ford returned, Manning and Engel went back to Chicago.

A couple of days later, Sharon Dugan again took Engel to the airport so that he could travel to Kansas City. Engel returned to Kansas City with Manning and again met Mammolito and McKillip. Mammolito and McKillip dropped Manning and Engel off in the Fairfax area of Kansas City, Kansas, for the purpose of stealing a car to use in the kidnapping.

Mammolito and McKillip then went to the house of Ford's sister, Carolyn Heldebrand, to plant a bugging device on Heldebrand's telephone. McKillip put on the utility line repairer's belt and a "Ma Bell" identification and climbed a telephone pole across the street. McKillip attached a bugging device to Heldebrand's telephone line. An FM radio could pick up the device's signal.

Later Mammolito, McKillip, Manning, and Engel met at a "safe house." They installed a red light, police radios, a police scanner and an antenna to a car stolen by Manning and

Engel. They then began watching Ford's apartment in Kansas City. Manning and Engel were in the stolen vehicle in one parking lot, and Mammolito and McKillip were in McKillip's car in another parking lot.

Ford and a friend, Mark Harris, arrived at the apartment at about 2:30 to 3:00 a.m. As they were getting out of Ford's truck, Manning and Engel ran up to them displaying badges and guns and yelling that they were DEA agents and that Ford and Harris were under arrest. Ford and Harris were told to face the truck and to put their hands on the truck as Manning and Engel searched them. They took a gun from Ford's pants. They handcuffed Ford and Harris and placed them in the back seat of the stolen car. They placed duct tape over Ford's and Harris' eyes.

Manning and Engel drove the stolen car with Ford and Harris in it. McKillip drove Ford's truck, and Mammolito drove McKillip's car back to the "safe house." Once there, Ford and Harris were handcuffed to a pole in the garage. Mammolito avoided Ford because Ford knew him and knew his voice. One of the kidnappers informed Ford that there was a contract on his life, and that someone had offered $100,000. Ford told them that he did not think he could come up with $100,000, but the kidnappers told him to come up with what he could.

The kidnappers allowed Ford to make some phone calls to raise money. They planned to pick up any money Ford could raise at Heldebrand's house. Heldebrand gathered $5000 and put it into a sack. Ford's friends went to Ford's apartment and picked up a briefcase full of money and dropped it off at Heldebrand's house.

Manning drove Ford's truck to Heldebrand's house to pick up the money. Heldebrand handed him a sack of money.

When he returned to the safe house, Manning was angry about the small amount of money in the sack, and he threatened to kill Ford and Harris. He hit Harris with a pipe. Ford called his sister and told her that she had forgotten the briefcase full of money. Manning went back to Heldebrand's house and picked up the briefcase.

In total, the kidnappers received about $30,000 to $50,000. They informed Ford that they would be back in about 30 days to collect the rest of the money. They divided up the money and left a 10 % share in the freezer of the safe house for the tipster, Goldyn. Engel also took one of Ford's rings.

The kidnappers then put Ford and Harris in a car, and Manning and Engel drove them to a cemetery on Blue Ridge. They removed the handcuffs on Ford and Harris but bound their hands with duct tape. They told Ford and Harris to sit down for a while before trying to get loose. They left Ford's truck nearby.

Manning and Engel drove away and headed to Kansas City International Airport to return to Chicago. Engel gave Sharon Dugan Ford's ring and told her that he had gotten it from a person they had kidnapped in Kansas City. Dugan heard Manning and Engel discuss pretending, during the kidnapping, to be DEA agents.

Ford and Harris removed the duct tape and drove Ford's truck to Ford's bar (App. A-56 to A-60).

2. Discovery

Ford and Harris did not immediately seek police help because of Ford's drug dealings and because they were concerned that the kidnappers would return in 30 days. But over the next months and years, police encountered physical

evidence of the crime.

In February 1984, Lillian Schoenberger's car, a 1984 Chevrolet Caprice, was stolen from the Fairfax area of Kansas City, Kansas. Police found the car on July 12, 1984, at Kansas City International Airport. A key was jammed in the car's ignition, and a hole, which could have held an antenna or similar device, had been cut in the car's rear quarter panel.

Also in early 1984, a Southwestern Bell Telephone Company technician removed a bugging device from a telephone pole near Heldebrand's house. The Federal Bureau of Investigation found a similar device in Engel's apartment in Chicago in August 1990.

In 1986, an FBI agent searched a storage locker belonging to Manning in Chicago. He found a paper with McKillip's name on it, two or three Illinois identification documents, a Minnesota driver's license, a Chicago police uniform badge, a Cook County Sheriff's Department badge, a document with Manning's picture and the name Steve Rosenbloom on it, assorted documents with other people's names on them, a document with Harris' name on it and descriptive information about him, a telephone bugging device, a police-type transmitter and receiver, and a portable antenna. Manning admitted that the items belonged to him.

On November 20, 1989, Buffalo Grove, Illinois, police received Ford's ring from Sharon Dugan, who said that Engel gave her a ring and told her that he had gotten it from a person they had kidnapped in Kansas City.

3. Identification, Arrest, and Indictment

Ford acknowledged the kidnapping to police in 1990, when he was negotiating a guilty plea to a drug charge.

In June 1990, Heldebrand identified Manning in a photograph lineup as the man who picked up the ransom money.

On July 20, 1990, the assistant prosecuting attorney of Clay County, Missouri filed a complaint in the Circuit Court of Clay County, Associate Division VI See Missouri Supreme Court Rule 22.01 (effective January 1, 1980) (App. A-104). That same day, the associate circuit court found probable cause that a felony had been committed by respondent, and the court issued a warrant for respondent's arrest (App. A-91). See Missouri Supreme Court Rule 22.03 (effective January 1, 1981).

Manning was arrested in Illinois and placed in the Cook County Jail on July 26, 1990 (App. A-4).

Sylvia Herrera knew Manning through her boyfriend, Tommy Dye. Dye asked her to help provide Manning an alibi for certain dates in February 1984. Herrera saw Manning in jail, spoke to him on the telephone, and received letters from Manning. Herrera went to a library and got copies of the *Sun Times* newspaper for Manning so that he could review what movies and events occurred during the period in question. Manning asked Herrera for information about her family. He instructed her to say that Manning was with her family during the days in which the kidnapping occurred and that they went to movies and did other things together. Manning told Herrera that she and her family would be paid thousands of dollars for providing him with an alibi.

Respondent appeared upon the warrant on September 28, 1990 (App. A-91). Missouri Supreme Court Rule 22.07(a) (effective January 1, 1980). Respondent had a preliminary hearing on October 9, 1990 (App. A-92). Missouri Supreme Court Rule 22.07(c) (effective January 1, 1980). The associate

circuit judge found probable cause and respondent was bound over for arraignment on October 15, 1990 (App. A-92). Missouri Supreme Court Rule 22.07(d) (effective January 1, 1980). The state filed an information on October 15, 1990, and respondent pled "not guilty" at the October 15, 1990 arraignment (App. A-92). Upon the state's motion, the case was dismissed on April 19, 1991 (A-94).

Meanwhile, on March 20, 1991, Manning was charged by indictment with two counts of kidnapping, §565.110, RSMo. 1986, and two counts of armed criminal action, §571.015, RSMo. 1986 (App. A-95).

4. Trials and post-trial proceedings

Manning's first trial ended in a mistrial.

At his second trial, Manning neither testified in his own behalf nor presented the testimony of other witnesses. At the close of the evidence, instructions and arguments of counsel, the jury found that respondent was guilty as charged. After finding respondent to be a prior offender, the trial court sentenced him to two life sentences for the counts of kidnapping and two fifty year sentences for the counts of armed criminal action. The sentences were ordered to run consecutively.

On May 21, 1992, respondent filed a motion to vacate, set aside or correct the judgment or sentence of the trial court pursuant to Missouri Supreme Court Rule 29.15. After appointment of counsel and amendment of the motion, the circuit court held an evidentiary hearing. The motion court then denied respondent's Rule 29.15 motion (App. A-76).

Respondent appealed to the Missouri Court of Appeals for the Western District. The Missouri Court of Appeals

affirmed respondent's conviction and sentence and affirmed the denial of post-conviction relief in the consolidated appeal (App. A-55).

Manning then sought a writ of habeas corpus from the United States District Court for the Western District of Missouri. After two amendments of the petition and discovery, the district court ordered the application for writ of habeas corpus denied (App. A-14).

Manning appealed to the United States Court of Appeals for the Eighth Circuit. That court concluded that Manning's Sixth Amendment right to counsel attached on July 20, 1991, when a complaint was filed in the Clay County, Missouri Associate Circuit Court. According to the court of appeals, the statements made to Sylvia Herrera were inadmissible because the taking of those statements violated Manning's Sixth Amendment right to counsel (App. A-6 to A-10).

REASONS FOR GRANTING THE WRIT

"In a line of constitutional cases in this Court stemming back to the Court's landmark opinion in *Powell v. Alabama*, 287 U.S. 45 (1932), it has been firmly established that a person's Sixth and Fourteenth Amendment right to counsel attaches only at or after the time that adversary judicial proceedings have been initiated against him." *Kirby v. Illinois*, 406 U.S. 682, 689 (1972). This case presents the question of what constitutes the point at which "adversary judicial proceedings have been initiated." The Eighth Circuit has placed that point much earlier than – and thus in conflict with – the placement by other courts. Knowing at what point the accused has a right to counsel is critical for law enforcement officers and for courts.

A. The Eighth Circuit held that "adversary judicial proceedings" begin on the day a criminal complaint is filed and an arrest warrant issued – long before any formal charge, preliminary hearing, information, indictment, or arraignment.

The Eighth Circuit found that information obtained by Sylvia Herrera from respondent while he was at the Cook County (Illinois) Jail was obtained in violation of respondent's Sixth Amendment right to counsel (App. A-6 to A-10).

Manning was jailed in Cook County after the Clay County Associate Circuit Court issued a warrant for his arrest. His detention there ended when he was taken to Clay County, Missouri. Only *after* Manning's arrival in Clay County – and thus after the conversations with Herrera took place – did the proceedings that juxtaposed Manning against the State take place. Only after his return to Clay County did Manning have a preliminary hearing (October 9, 1990), or an arraignment on the information (October 15, 1990).

The Eighth Circuit relied principally on this Court's decision in *Maine v. Moulton*, 474 U.S. 159 (1985). There this Court said that Sixth Amendment rights apply not just at trial, but at other "'critical' stages in the criminal justice process 'where the results might well settle the accused's fate and reduce the trial itself to a mere formality.'" 474 U.S. at 170, quoting *United States v. Wade*, 388 U.S. 218, 224 (1967). The Court did not precisely identify those "critical stages," but it did explain that "adversary criminal proceedings," as the Court had explained twice before, exist once "the government has committed itself to prosecute, and . . . the adverse positions of government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law." *Kirby v. Illinois*, 406 U.S. at 689, quoted in *Moulton*, 474 U.S. at 171, and in *United States v. Gouveia*, 467 U.S. 180, 189 (1984).

In the Eighth Circuit's view, the mere filing of a criminal complaint and the issuance of an arrest warrant creates an "adversary criminal proceeding." That view is contrary to the views expressed by other courts.

B. The Missouri Supreme Court has held under the same law being applied by the Eighth Circuit, "adversary judicial proceedings" do not begin until there is a formal charge, preliminary hearing, indictment, information, or arraignment.

In *Kirby v. Illinois*, this Court summarized its prior decisions regarding the point at which Sixth Amendment rights attach, and listed the proceedings to which the Sixth Amendment has been applied: "formal charge, preliminary hearing, indictment, information, or arraignment." 406 U.S. at 689. In fact, until the Eighth Circuit's decision here, courts

have consistently defined the point as one much later than the mere issuance of an arrest warrant.

The Missouri Supreme Court has determined that the right to counsel attaches upon indictment or information. That determination is most clearly stated in *State v. Beck*, 687 S.W.2d 155 (Mo. banc 1985), *cert. denied*, 476 U.S. 1140 (1986).

In *Beck*, the Missouri Supreme Court used this Court's teachings in *Kirby v. Illinois* and *Brewer v. Williams*, 430 U.S. 387 (1987) in resolving whether a defendant's Sixth Amendment right to counsel had attached in circumstances that parallel those in this case. The statements in dispute were made after "prosecutor Kohl, in an ex parte proceeding, swore out an affidavit to obtain a warrant for defendant's arrest," but before the defendant arrived back in Missouri after an out-of-state arrest. The court defined the point of attachment using the words of this Court in *Kirby*, then held that the point had not been reached merely because of the affidavit, warrant, and arrest:

> Attachment of the right to counsel occurs at the initiation of adversary judicial proceedings against an accused "by way of *formal charge, preliminary hearing, indictment, information or arraignment.*" [*Kirby v. Illinois*, 406 U.S. at 689] . . . When defendant was arrested and gave statements to the deputies . . . , *none* of these procedural events had transpired. It was not until September 29, 1981 that an information was filed formally charging defendant with two counts of capital murder.

687 S.W.2d at 160 (emphasis in original). The court continued, again using language that with little modification would fit the

facts here:

> At the time these statements were made, the only document that had been filed was an affidavit sworn out by the prosecuting attorney – for the sole purpose of securing an arrest warrant with which to apprehend defendant who was over one thousand miles away in Florida. Defendant would have us color this ex parte event as the initiation of adversary judicial proceedings sufficient to trigger his Sixth Amendment right to counsel. In *Morris v. State*, 532 S.W.2d 455 (Mo. banc 1976), the Court, citing *Kirby* with approval, determined that the issuance of an arrest warrant did not amount to the initiation of adversary judicial proceedings – as defined within the framework of *Kirby*. *See also State v. Boggs*, 634 S.W.2d 447 ([Mo. banc] 1982) (Sixth Amendment right to counsel attached after indictment or information or commencement of adversary criminal proceedings).

State v. Beck, 687 S.W.2d at 160.

The Missouri Supreme Court's holdings in *Beck*, *Morris*, and *Boggs* were consistent not only with *Kirby*, but with the significance of a criminal "complaint" under Missouri law. The role of such a "complaint" is limited. The contents of the complaint are listed in Missouri Supreme Court Rule 22.02 (effective January 1, 1980). A complaint and a judicial determination of probable cause are necessary for the issuance of an arrest warrant. Missouri Supreme Court Rule 22.03 (effective January 1 1981). "Though the complaint may initiate felony proceedings, it is merely a prelude to felony prosecution, for in felony cases the complaint serves as a precursor to the

preliminary hearing required by § 544.250. Only after a preliminary hearing in which the magistrate finds probable cause to believe the prisoner is guilty, may an information be filed in a felony case." *State ex rel. Morton v. Anderson*, 804 S.W.2d 25, 26 (Mo. banc 1991). "An information instigates a prosecution against an alleged felon, and the mere filing of a complaint does not confer jurisdiction upon a court to adjudicate the offense." *Id.* at 26.

The Eighth Circuit's decision is directly contrary to the Missouri Supreme Court's holdings.

C. Federal courts have held that in federal criminal law, "adversary judicial proceedings" do not begin until there is a formal charge, preliminary hearing, indictment, information, or arraignment.

The procedure provided by Missouri rules and the cases describing those rules is remarkably similar to the procedure enacted by Congress in the Federal Rules of Criminal Procedure. In the section entitled Preliminary Proceedings, there is Federal Rule of Criminal Procedure 3 which describes the complaint in the federal process. Federal Rule of Criminal Procedure 4 discusses the issuance of an arrest warrant upon the filing of a complaint. That rules corresponds with Missouri Supreme Court Rule 22.03 (effective January 1, 1981).

Given the similarity between the Missouri rules and the federal rules, it is unsurprising that the decisions of the various federal circuit courts of appeals echo the language and the holding of the Missouri Supreme Court in *Beck*.

One of those decisions is from the Eighth Circuit itself: *United States v. Moore*, 122 F.3d 1154 (8th Cir. 1997), *cert. denied*, 522 U.S. 1135 (1998). There the Bureau of Alcohol, Tobacco and Firearms had filed a criminal complaint against

the defendant in federal district court. An affidavit by a federal agent accompanied the complaint. A United States Magistrate Judge found probable cause and issued a warrant for the defendant's arrest. *Id.* at 1155. Between the issuance of the warrant and the indictment, a federal agent subsequently obtained statements from the defendant. On appeal, court rejected the defendant's claim that his Sixth Amendment right to counsel attached with the filing of the criminal complaint. The court construed Federal Rule of Criminal Procedure 3 and determined that the federal complaint was not a formal charge that gives rise to the Sixth Amendment right to counsel.

> As explained in *United States v. Pace*, 833 F.2d 1307, 1312 (9th Cir. 1987), *cert. denied*, 486 U.S. 1011, 108 S.Ct. 1742, 100 L.Ed.2d 205 (1988), and *United States v. Duvall*, 537 F.2d 15, 22 (2nd Cir. 1976), *cert. denied*, 426 U.S. 950, 96 S.Ct. 3173, 49 L.Ed.2d 1188 (1976), the principal function of a complaint under Fed.R.Crim.P. 3 is to serve as the basis for a judicial determination of probable cause for an arrest warrant under Fed.R.Crim.P. 4(a). Complaints under Fed.R.Crim.P. 3 are, therefore, by definition, issued before an arrest occurs. If an arrest does not trigger the Sixth Amendment right to counsel, we are unable to see how the issuance of a complaint that serves as the basis for a probable cause determination authorizing a later arrest would trigger that right. Because warrantless arrests are sometimes authorized, moreover, we note that if we were to hold that the right to counsel does attach when a complaint under Fed.R.Crim.P. 3 issues, we would be granting greater protection to persons arrested with warrants than without, thus discouraging the use of warrants in making

> arrests for federal crimes. *See Duvall*, 537 F.2d at 22. We therefore hold that the issuance of a complaint under Fed.R.Crim.P. 3 is not the type of "formal charge" contemplated by *Kirby*, 406 U.S. at 689, 92 S.Ct. at 1882 (plurality opinion), and that a person's Sixth Amendment right to counsel does not attach upon the filing of such a complaint. *See, e.g., United States v. Langley*, 848 F.2d 152, 153 (11th Cir. 1988) (*per curium*), *cert. denied*, 488 U.S. 897, 109 S.Ct. 241, 102 L.Ed.2d 230 (1988); *Pace*, 833 F.2d at 1312; and *Duvall*, 537 F.2d at 22.

United States v. Moore, 122 F.3d at 1156. The Eighth Circuit reached the same conclusion in *Von Kahl v. United States*, 242 F.3d 783, 789 (8th Cir. 2001) where it determined that the defendant's Sixth Amendment rights did not attach until the preliminary hearing.

Other circuits have reached the same conclusion.

In *United States v. Duvall*, 537 F.2d 15, 22 (2nd Cir.), *cert. denied,* 426 U.S. 950 (1976), the court focused on the limited role of the complaint under Federal Rules of Criminal Procedure 3 and 4 and determined that there was no right to counsel immediately upon arrest pursuant to a warrant.

In *United States v. Hayes*, 231 F.3d 663, 675 (9th Cir. 2000) (*en banc*), *cert. denied*, 121 S.Ct. 1388 (2001), the Ninth Circuit said it was "loath to engraft some new pre-indictment proceeding onto the rule" in *Kirby*. Accordingly, the Sixth Amendment right to counsel attached upon indictment by the grand jury, not at a preindictment deposition. Id. Earlier, in *United States v. Pace*, 833 F.2d 1307, 1312 (9th Cir. 1987), *cert. denied*, 486 U.S. 1011 (1988), the Ninth Circuit applied the rule and analysis of the Second Circuit in *Duvall*.

And in *United States v. Langley*, 848 F.2d 152, 153 (11th Cir. 1988), the Eleventh Circuit concluded that the mere filing of a federal complaint and issuance of an arrest warrant did not give rise to the right to counsel.

D. None of the decisions cited by the Eighth Circuit in support of its conclusion set the point of Sixth Amendment attachment as early as the filing of a complaint or affidavit and issuance of an arrest warrant.

The Eighth Circuit below cited four cases to support its position (App. A-7). None of those cases, however, hold that a complaint under Missouri Supreme Court Rule 22.02 or Federal Rule of Criminal Procedure 3 initiated the Sixth Amendment right to counsel.

In *Chewning v. Rogerson*, 29 F.3d 418, 420 (8th Cir. 1994) (App. A-7), the litigants assumed that the right to counsel attached after a formal criminal complaint was made by the Iowa prosecutor. *Id.* There was no holding by the Court of Appeals to that effect. Id.

Smith v. Lockhart, 923 F.2d 1314, 1318 (8th Cir. 1991), concerned an "omnibus pretrial hearing." Id. The defendant was arraigned on October 8, 1986. *Id.* at 1317. The omnibus pretrial hearing occurred on November 6, 1986. *Id.* Thirteen days later, the defendant went to trial. *Id.* at 1318. In *Smith*, the court only held that a post-arraignment proceeding included a right to counsel.

And in *Gilmore v. Armontrout*, 861 F.2d 1061, 1070 (8th Cir. 1988), *cert. denied*, 490 U.S. 1114 (1989), all the court did was to quote *Kirby*. The language the *Gilmore* court quoted did not stand for the proposition that the right to counsel attaches upon the signing or filing of a complaint. What this

Court said in *Kirby* was that there was no consensus, yet, on what constituted the beginning of an "adverse judicial proceeding":

> But the point is that, while members of the Court have differed as to existence of the right to counsel in the contexts of some of the above cases, all of those cases have involved points of time at or after the initiation of adversary criminal proceedings –whether by way of formal charge, preliminary hearing, indictment, information or arraignment.

Kirby, 406 U.S. at 689. This Court did not refer to "complaint" or "affidavit." Nor did it do so in any of "those cases" that it referred to in *Kirby*. In fact, they all dealt with the right to counsel at a later stage. *Powell v. Alabama*, 287 U.S. 45 (1932) (arraignment); *Johnson v. Zerbst*, 304 U.S. 458 (1938) (trial); *Hamilton v. Alabama*, 368 U.S. 52 (1961) (arraignment); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (trial); *White v. Maryland*, 373 U.S. 59 (1963) (preliminary hearing); *Massiah v. United States*, 377 U.S. 201 (1964) (after indictment); *United States v. Wade*, 388 U.S. 218 (1967), and *Gilbert v. California*, 388 U.S. 263 (1967) (post-indictment lineups); *Coleman v. Alabama*, 399 U.S. 1 (1970) (preliminary hearing). In none of those cases did the court hold, or even suggest, that the initiation of adversary judicial proceedings began with a complaint.

The final case cited by the court of appeals was *Maine v. Moulton*, 474 U.S. 159, 171 (1985) which does not support the extension of the Sixth Amendment right to counsel to filing of a complaint or issuance of a warrant. Instead, the defendant had been indicted before he made his statements. *Id.* at 161. None of the cases cited by the court of appeals support the courts' extension of the Sixth Amendment right to counsel.

E. The Eighth Circuit's holding creates problems for law enforcement and defendants.

Both law enforcement officials and defendants need to know when Sixth Amendment rights attach. Today, those in the Eighth Circuit know that they attach at the time of an arrest warrant issues. Those in the Second, Ninth, and Eleventh Circuits know that it does not attach at that point. Those in other circuits simply do not know. Federal, state and local police need to know how they can obtain information that can be used at a later criminal trial. Those arrested need to know at what point they can demand counsel. Because of the Eighth Circuit's decision, the knowledge is simply not available in much of the country.

And the situation is problematic even in the Second, Eighth, Ninth, and Eleventh Circuits. After all the questioning at issue here took place not in the Eighth Circuit, but in the Seventh. Law enforcement officers trained in one circuit according to that circuit's rule may be violating the rule in another circuit where the evidence is ultimately used. The court should grant the petition and eliminate the confusion and conflict inherent in such a situation.

The Eighth Circuit's rule will be problematic even in cases where only that circuit is involved. As explained by the Second Circuit in *United States v. Duvall*, the Eighth Circuit's rule creates a disincentive for the use of arrest warrants – a disincentive contrary to any social policy that the courts ought to encourage. 537 F.2d at 22.

CONCLUSION

For the foregoing reasons, petitioner prays the court grant the petition for writ of certiorari and reverse the judgment of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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